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September 26, 2013

Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action
U.S. Department of the Interior
1849 C Street, NW, MS 4141
Washington, D.C. 20240

Re: Comments of Kent School to Discussion Draft for Revisions to Regulations on Federal Acknowledgment of Indian Tribes (25 C.F.R. § 83 or Part 83); Docket No. 1076-AF18

Dear Ms. Appel:

Please find enclosed the Comments on Discussion Draft for Revisions to Regulations on Federal Acknowledgment of Indian Tribes (25 C.F.R. § 83 or Part 83), Docket No. 1076-AF18. These comments were filed electronically via email to consultation@bia.gov on September 25. Should you have any questions, please contact the undersigned.

Sincerely,

Donald C. Baur

Enclosure

KENT SCHOOL

September 25, 2013

The Honorable Kevin K. Washburn
Assistant Secretary - Indian Affairs
Department of the Interior
MS-4141 -MIB
1849 C Street, N.W.
Washington, D.C. 20240

Dear Assistant Secretary Washburn:

The Kent School Corporation submits the enclosed comments in response to the *Discussion Draft for Revisions to Regulations on Federal Acknowledgement of Indian Tribes (25 C.F.R. § 83 or Part 83)*, available on the Bureau of Indian Affairs website at http://www.bia.gov/cs/groups/xraca/documents/text/idc1-022705.pdf. Kent School appreciates the opportunity to provide comments on the Discussion Draft.

As discussed in the enclosed report prepared by our legal counsel, Kent School has extensive experience with the tribal acknowledgment process as a result of participating in the review of the petition submitted by the Schaghticoke Tribal Nation (STN) as an interested party. Kent School found it necessary to participate in the STN proceeding because of a land claim filed against our campus by the petitioner. Based upon that experience, Kent School has several significant concerns with proposed revisions set forth in the Discussion Draft. The enclosed comments present the School's comments and concerns in considerable detail. We do not believe any further action should be taken on the Discussion Draft until these issues have been addressed.

Thank you for considering the enclosed comments prepared on behalf of Kent School.

Sincerely,

Richardson W Schell

Richardson W. Schell
Headmaster and Rector

cc: Senator Richard Blumenthal
Senator Chris Murphy
Representative Elisabeth Esty
Governor Dannel Malloy
Attorney General George Jepsen

Comments on Discussion Draft for Revisions to Regulations on Federal Acknowledgment of Indian Tribes (25 C.F.R. § 83 or Part 83), Docket No. 1076-AF18

Prepared for Kent School by

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September 25, 2013

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Introduction

Kent School hereby submits these comments on the Preliminary Discussion Draft of Proposed Revisions to the Federal Acknowledgment Regulations (Part 83 of Title 25 of the Code of Federal Regulations) issued by the Office of the Assistant Secretary – Indian Affairs on June 21, 2013 (Discussion Draft). Kent School submits these comments because hundreds of acres of its core campus are subject to a land claim lawsuit filed by the Schaghticoke Indian Tribe in 1975. The land claim case has been carried forward in recent years by the Schaghticoke Tribal Nation (STN), a tribal acknowledgment petitioner group denied status as a federal tribe under Part 83 on October 11, 2005. The issue of whether the STN is a federal tribe is a central question in the land claim lawsuit. BIA's final decision to deny acknowledgment to the STN as a federal Indian tribe has been upheld by the courts. *STN v. Kempthorne*, 587 F.Supp. 2d 389 (D.Conn. 2008), *aff'd*, 587 F.3d 132 (2d Cir. 2009), *cert den. sub nom. STN v. Salazar*, 131 S. Ct. 127 (2010). The land claim lawsuit remains pending, however, and STN has appealed the District Court dismissal of that case in *U.S. v. 43.47 Acres of Land*, 896 F.Supp. 2d 151,154 (D. Conn. 2012) to the Second Circuit. A rival petitioner group, the Schaghticoke Indian Tribe (SIT) is now advancing through the Part 83 acknowledgment process. If SIT attains status as a federal tribe, it may also assert a claim for Kent School land. Kent School's comments have therefore been informed by years of litigation regarding tribal status, a strong familiarity with the process, and extensive expertise regarding the acknowledgment standards, which the STN has been definitively determined to not satisfy. Changing the acknowledgment standards now not only dilutes what it means to be a tribe, it will also perpetuate meritless land claim litigation that has been pending for nearly 40 years.

Kent School

Established in 1906, Kent School is a private, co-educational college preparatory school located in Kent, Connecticut. It is one of the earliest New England boarding schools, and it retains its affiliation with the Episcopal Church. Students at Kent come from more than 40 foreign countries and nearly as many states. Situated between the Appalachian Trail and the Housatonic River, the 1,200-acre campus currently serves 560 students.

Kent School prides itself in its respect for human rights, equality, and diversity. Kent School emphasizes these values in its curriculum, employment practices, and outreach to racially and ethnically diverse communities, including Native American individuals and tribes. These principles have always governed Kent School's relationship with the STN, the SIT, and individuals of Native American descent. Kent School supports the acknowledgment of Indian Tribes under federal law, subject to clear, consistent and objective criteria that provide for adequate participation by interested parties. At the same time, Kent School is vigorously committed to the defense of its campus from land claim lawsuits. So long as the threat of a land claim persists, the School has no choice other than to participate in tribal acknowledgment proceedings and policy initiatives that apply to STN and SIT. Because the Discussion Draft would significantly alter Part 83, by limiting the role of interested parties, allowing STN to reopen its petition and SIT to continue to prosecute its petition under criteria that are much easier to satisfy and that have no basis in federal law or Bureau of Indian Affairs (BIA) precedent, and

relaxing the standards applicable to the SIT petition, Kent School must oppose the Discussion Draft.

Kent School's Experience With the Tribal Acknowledgment Process

The defense of Kent School's campus from the STN land claim involves the threshold question of whether the tribe exists under federal law. Acknowledgment as a federal tribe is necessary to confer standing on the STN to maintain a land claim under the Non-Intercourse Act. *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994). It is for this reason that the U.S. District Court for the District of Connecticut stayed all proceedings in the land claim litigation pending the resolution of the STN's acknowledgment petition to the BIA under 25 C.F.R. Part 83.

The land claim threat led Kent School to seek interested party status in accordance with 25 C.F.R. § 83.10 throughout the BIA's active consideration of the STN petition. Kent School would be adversely affected by the establishment of a federal reservation and trust land in the vicinity of its campus that would remove state and local land use, environmental, public health and safety, and other laws and regulations. The development of nearby lands for a casino or other large-scale commercial purposes also would degrade the local environment and the surroundings of which Kent School is a part. Faced with these threats, Kent School, other land claim defendants including the town of Kent, and the State of Connecticut participated in every aspect of the STN acknowledgment proceeding. For these reasons, Kent School also obtained status as an interested party in the SIT petition review by order of BIA on February 13, 2013.

The standards that have applied in the past are rigorous and appropriate, given the import of acknowledgment decisions. On October 11, 2005, BIA issued its Reconsidered Final Determination (RFD) to deny acknowledgment of the STN as an Indian tribe under federal law. The RFD followed a May 12, 2005 decision by the Interior Board of Indian Appeals (IBIA) remanding the positive Final Determination (FD) in favor of the STN issued by BIA on February 5, 2004. *In re Federal Acknowledgment of Schaghticoke Tribal Nation*, 41 IBIA 1 (2005). The IBIA took this action on the grounds that BIA had placed inappropriate weight on the State of Connecticut's recognition of the Schaghticoke Tribe and the existence of a reservation under State law. As the IBIA held, state recognition "is not reliable or probative evidence demonstrating the actual existence of community or political influence or authority within that group." *Id.* at 34. The IBIA ruled that, to be probative under Part 83, state recognition "would need to be more than 'implicit', and would need to be expressed in some way that reflected the actual or likely existence of those interactions and social relationships." *Id.* at 18. On remand from the IBIA, BIA determined that the State's relationship with the STN did not meet this test and that the STN failed to satisfy the requirements of 25 C.F.R. § 83.7(b) and (c), leading to the negative RFD.

STN filed a lawsuit under the Administrative Procedure Act challenging the RFD. As cited above, the STN's efforts to overturn the RFD failed in District Court, in the Second Circuit, and in a petition for certiorari review by the U.S. Supreme Court. The STN have, quite simply, lost in their quest for federal acknowledgment at every administrative and judicial level, and

there is no reason or basis to reopen its petition. In addition, there are no grounds under the current Part 83 rules upon which the SIT petition could achieve a different result.

As this history demonstrates, Kent School has been a reluctant but vigorous participant in the STN and SIT acknowledgment proceedings and the related litigation. In doing so, Kent School has become well-versed in the Part 83 process from the perspective of an interested party. We are, therefore, exceptionally well-qualified to comment on the Discussion Draft. These comments derive from our vast experience with tribal acknowledgment law and policy, and they are intended to assist BIA in understanding why the Discussion Draft must be withdrawn and either abandoned or replaced with a more limited set of proposed changes to Part 83.

The Discussion Draft's Radical Approach to Tribal Acknowledgment Confirms the Absence of Properly Delegated Legal Authority

The Discussion Draft would implement sweeping changes to the substantive criteria for federal acknowledgment and the procedures used to make those decisions. In fact, the changes are so far-reaching that the new Part 83 rules would bear little resemblance to the current regulations. Among the more notable problematic changes are the following:

- Eliminate the letter of intent requirement, which is the best mechanism for tracking petitions and providing notice to interested parties.

- Eliminate the requirement in 25 C.F.R. § 83.7(a) for petitioners to provide evidence of external identification of tribal existence since 1900.

- Reduce the time period of evaluation of evidence for social community, *id.* § 83.7(b), and political influence or authority, *id.* § 83.7(c), from the present requirement of 224 years (from 1789)[1] to a mere 80 years, as triggered by the Indian Reorganization Act (IRA) of 1934.

- For petitioners with State-recognized reservations since 1934, such as Connecticut's STN/SIT, the Golden Hill Paugussett, and Eastern Pequot groups, eliminate altogether the requirements of proving external identification, social community and tribal political influence or authority under an expedited favorable finding process.

- Eliminate the rigorous and objective procedures under which petitioners must meet their evidentiary burden, subject to comment from interested parties under all of the criteria, in favor of an expedited review without any third-party participation leading to automatic acknowledgment for petitioners who meet the relaxed descent criteria of section 83.7(e) and have maintained a State-recognized reservation since 1934.

[1] At the time of the STN RFD, the time period covered an even longer time span of about 285 years, beginning around 1720. 67 Fed. Reg. 76187 (Dec. 11, 2002). In 2008, BIA relaxed the point of first sustained contact requirement to be only 1789, the date of ratification of the U.S. Constitution. 73 Fed. Reg. 30146, 30147 (May 23, 2008). This change already made the acknowledgment standards more flexible and accommodating to petitioners, and no further revision is appropriate.

- Lower the percentage of present group members that would be required to meet the criterion for descent from an historical tribe.

- Abandon the longstanding rule, in place since the first acknowledgment regulations in 1978, that groups denied acknowledgment are not allowed to reapply.

- Prevent affected landowners, such as Kent School, from being able to contest the BIA decision at the FD stage if a local or state government does not file opposition comments.

- Eliminate IBIA review, the very step in the Part 83 review of the STN petition that eliminated the state reservation presumption in favor of acknowledgment and brought common sense and objectivity to the BIA review.

- Create a relaxed burden of proof for the petitioner under a preponderance of the evidence test, as opposed to the more rigorous burden under the current rules.

- Create a requirement to read evidence in the light most favorable to the petitioner, instead of objectively and in accordance with its true meaning.

- Set an arbitrary page limit on evidence that works to the benefit of petitioners when considered with the requirement to consider evidence favorably for the petitioner.

- Allow petitioners to withdraw from active consideration at any time, creating an advantage for avoiding negative FDs and increasing cost and administrative inefficiency.

- Eliminate the opportunity for on-the-record technical assistance meetings that have been so helpful to all parties.

- Provide technical assistance to petitioners to challenge or support proposed findings.

- Create a formal hearing process before the Office of Hearings and Appeals, which has no experience with tribal acknowledgment, and allow only the petitioner to submit evidence and cross-examine witnesses.

These extreme changes in acknowledgment standards -- undertaken with no explanation and on the basis of an apparent political whim -- are at odds with decades of acknowledgment practice, would result in many unjustified positive tribal acknowledgment determinations, and would make the Part 83 process even more controversial, complex, and expensive than it is today.

The drastic changes the Discussion Draft would make to Part 83 would lend strong support to the argument that, due to the absence of statutory standards to guide BIA acknowledgment decisions, there is no valid delegation of power to the Executive Branch from Congress. *Whitman v. Am. Trucking Ass'ns*, 591 U.S. 457, 472 (2001). It is a fundamental principle of constitutional law that Congress, through its enactment of a statute, may delegate a portion of its legislative powers to the Executive Branch, *but only if* the text of the statute sets

out an "intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform...." *J.W. Hampton, Jr. & Co. v. U.S.*, 276 U.S. 394, 409 (1928). A statutory provision that purports to delegate power will be declared unconstitutional if Congress "has declared no policy, has established no standard, has laid down no rule" for the exercise of that power. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935). *See also Yakus v. U.S.*, 321 U.S. 414, 426 (1944) (A statute is invalid if it suffers from "an absence of standards for the guidance of [agency action], so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed").

The Discussion Draft reveals that this severe constitutional infirmity lies at the heart of the BIA acknowledgment program. Simply put, there are no statutory standards to apply to determine whether the criteria and procedures in the Discussion Draft satisfy the terms for the Congressional delegation.. The statutory authorities relied upon BIA as the basis for its acknowledgment rules — 5 U.S.C. § 301, 25 U.S.C. § 2, 25 U.S.C. § 9, and 43 U.S.C. § 1457 — say nothing about tribal acknowledgment. They merely confer general authority on the Secretary of the Interior to deal with Indians. Not only do these provisions say nothing about acknowledgment, they do not contain any provisions even approximating a set of "standards for the guidance" of agency action.

For 40 years, BIA has been able to avoid a serious legal challenge under the "delegation doctrine" because it has consistently applied a reasonably rigorous set of principles that serve as a meaningful test of tribal existence. The Discussion Draft, however, would cast that precedent aside and substitute a dramatically different set of relaxed requirements that make it much easier for petitioners to gain federal acknowledgment. As noted above, the Discussion Draft amounts to a wholesale reworking of the acknowledgment program, which essentially eviscerates the current Part 83. If adopted as a final rule, the Discussion Draft would lead to dramatically different results than the current Part 83 standards. Indeed, for the STN, the Discussion Draft would convert a negative finding achieved after years of administrative review, an administrative appeal, and three levels of judicial review – spanning more than three decades – into an automatic grant of acknowledgment under an expedited process with no interested party involvement. A more definitive example of the need for clearly articulated Congressional standards cannot be imagined. Yet, there are no statutory standards to turn to for purposes of evaluating whether such fundamentally inconsistent results based on the same set of facts comports with the intent of Congress. To persist in the current course of reinventing the acknowledgment criteria from top to bottom will, in all likelihood, lead to a legal challenge to the very underpinnings of BIA's Part 83 rules arising under the delegation doctrine. BIA can avoid this legal confrontation by abandoning the Discussion Draft, adhering to the basic principles that have guided the acknowledgment process since the inception of the regulations in 1978, or considering more reasonable and limited changes to Part 83.

Substantive Deficiencies

The Discussion Draft is laden with substantive deficiencies that depart dramatically from BIA precedent, case law, and rational decision-making. Among the more serious substantive flaws that must be withdrawn from the Discussion Draft are the following:

Expedited Favorable Finding -- Proposed section 83.10(g) is the most egregious, and blatantly illegal, element of the Discussion Draft. This provision would establish the following fast-track process to acknowledgment:

> If the petitioner meets the mandatory criteria at paragraphs (e) [descent], (f) [members not of other acknowledged tribes], and (g) [no congressional termination] of § 83.7 and the petitioner asserts that it is eligible for an expedited favorable finding, OFA will next conduct an expedited favorable review. If the petitioner provides the information required by criterion (d) [tribal governing document] of § 83.7 and meets either of the criteria in paragraph (3) of this section, OFA will issue an expedited favorable proposed finding in the Federal Register summarizing its findings. ...
>
> (3) The expedited favorable criteria are:
>
> > (i) The petitioner has maintained since 1934 a reservation recognized by the State and continues to hold a reservation recognized by the State....

Discussion Draft § 83.10(g).

Section 83.10(o) further provides that a positive FD shall issue if the petitioner "meets the mandatory criteria in paragraphs (d), (e), (f), and (g) of § 83.7 and one of the expedited favorable criteria in § 83.7." In addition, section 83.10(r) creates the opportunity for denied petitioners to seek reconsideration and invoke this fast track process.

Taken together these provisions would almost certainly lead to the automatic acknowledgment of a group, like the STN, that has held a State-recognized reservation since 1934 and can prove tribal descent. This result would attain even if, like the STN, the petitioner cannot meet the standards for social community (criterion (b)) and political authority (criterion (c)), including during the post-1934 period. And, this same favorable outcome would result for a petitioner, like the STN, even if the state reservation in no way served, in law or fact, as a community base or political focal point (In point of fact, members of the STN do not, and never have, resided on the state-recognized reservation). In short, section 83.10 would award federal acknowledgment for a group that is simply the beneficiary of state largesse in the form of a land base set aside in its name and that happens to have a sufficient number of members of tribal descent. The many other indicia of tribal status required of every tribe under the current regulations would be irrelevant.

This element of the Discussion Draft is prohibited under numerous decisions:

- BIA's own precedent in the STN and Historic Eastern Pequot RFDs, as confirmed by the IBIA in the decision *In re Federal Acknowledgment of Schaghticoke Tribal Nation*, 41 IBIA 30 (2005).

- The prohibition on recognizing a tribe on the basis of descent alone. *U.S. v. Antelope*, 430 U.S. 641, 645 (1977); *Morton v. Mancari*, 417 U.S. 535, 553 (1974); Muwekma *Ohlone Tribe v. Salazar*, 708 F.2d 209, 215 (D.C. Cir. 2013).

- The requirement for an actual showing of community together with political authority over time. *Montoya v. U.S.*, 180 U.S. 261, 266 (1901); *U.S. v. Candelaria*, 271 U.S. 432, 439 (1926); *Miami Nation of Indians of Indiana v. U.S. Dep't of the Interior*, 255 F.3d 342, 350-51 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002); *Golden Hill Paugussett Tribe of Indians*, 39 F.3d. at 59.

Taken on its own terms, and under this precedent, the Expedited Favorable Finding provision in the Discussion Draft is plainly illegal. When applied to previously denied petitioners, like STN, who have been specifically evaluated *and denied* because the state reservation did not serve a community or political authority purpose and the petitioner failed criteria (b) and (c) for even the post-1934 period, section 83.10 is nothing short of a blatant attempt to award acknowledgment to demonstrably unqualified groups. These provisions of the Discussion Draft should be removed from any proposed rule or, at the very least, not be made available to any previously denied groups (STN) or new petitioner (SIT) laying claim to a reservation already determined to not serve as a relevant factor for federal acknowledgment.

The 1934 Start Date -- The new criteria in the Discussion Draft represent a wholesale departure from not only BIA's current Part 83 regulations but also from the central premise of tribal acknowledgment policy that a tribe must be able to prove continuity as a social community and political body from historic times to the present. In particular, by eliminating the requirement that a tribe must prove its continued existence from at least the date of the U.S. Constitution and using instead the arbitrary date of 1934, the Discussion Draft abandons decades of precedent and sets forth what would be, in effect, an entirely new definition of a tribe that cannot be sustained under overwhelming judicial precedent.

The requirement for longstanding and continued existence as a social community and political entity finds its roots in both case law and BIA administrative action.

In the courts, the requirement that a tribe must maintain continuous existence from historic times to the present traces from the decision in *Montoya*, where the U.S. Supreme Court held:

> By a "tribe" we understand a body of Indians of the same or similar race, united in a community under one leadership or government and inhabiting a particular though sometimes ill-defined territory. . . .

180 U.S. at 266. Many subsequent court decisions have applied this same principle, and have measured tribal existence from a point in time that is before or contemporaneous with the establishment of the United States or the first sustained contact between the tribe and non-Indians. There is no case law that would support tribal existence as of 1934, as proposed by the

Discussion Draft. Among the many cases requiring social community and political authority are the following:

- *United States v. Washington*, 641 F.2d 1368, 1372-73 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982) ("[f]or this purpose, tribal status is preserved if some defining characteristic of the original tribe persists in an evolving tribal community").

- *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 377-378 (1st Cir. 1975) ("the Passamaquoddies were a tribe before the nation's founding and have to this day been dealt with as a tribal unit by the State").

- *Catawba Indian Tribe of S.C. v. South Carolina*, 718 F.2d 1291 (4th Cir. 1983), *rev'd sub nom. South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986) (Regarding the tribe's continuous existence, the court noted that the tribe "occupied its aboriginal territory" "[l]ong before . . . settlers came to North America," 718 F.2d at 1293, and that the tribe had "continued" to fulfill the *Montoya* requirements, *id.* at 1298).

- *Mashpee Tribe v. Sec'y of Interior*, 820 F.2d 480 (1st Cir. 1987) (The *Mashpee* court noted that, to have a claim under the Nonintercourse Act, a tribe must have been a tribe both (1) at the time of alienation and (2) at the time of the suit. The tribes failed to meet the first requirement, as they only submitted four nineteenth century documents, none of which proved tribal status).

- *United States v. 43.47 Acres of Land*, 855 F. Supp. 549 (D. Conn. 1994) (The court also held that, under *Montoya*, a tribe must prove that it existed before the creation of the United States. The tribe in question was the STN).

- *Native Vill. of Venetie I.R.A. Council v. Alaska*, Nos. F86-0075, F87-0051, 1994 WL 730893 (D. Alaska Dec. 23, 1994) (The court held that the Village met the *Montoya* test because anthropological evidence showed that the group was "identified as a separate group of Indians at the time of the first historical contact with Hudson Bay Traders." 1994 WL 730893, at *13. Further, Village members "have, since before the appearance of non-natives, inhabited a reasonably well-defined territory to the virtual exclusion of other people; and in modern times have occupied much of that same territory . . . ." *Id.* Finally, while pre-contact information about the tribe was sparse, the court found that there were "united communities" and "subcommunities [that] were clearly connected by family relationships since first recorded history." *Id.* at *17–*18).

- *New York v. Shinnecock Indian Nation*, 400 F. Supp. 2d 486 (E.D.N.Y. 2005) (The court found that the tribe met the *Montoya* requirements and was a tribe under federal common law. Among other factors, the court noted that the tribe held the disputed lands at the time of first contact; that it was the subject of

multiple state laws; that it had transacted with the state; and that it had, since 1792, met every six years to elect a new tribal leader. Accordingly, the court held, the tribe did not need to seek federal recognition before beginning to develop gaming facilities on its land).

- *Unalachtigo Band of Nanticoke-Lenni Lenape Nation v. New Jersey*, No. 05-5710, 2008 WL 2165191 (D.N.J. May 20, 2008), *vacated in part sub nom. Unalachtigo Band of Nanticoke Lenni Lenape Nation v. Corzine*, 606 F.3d 126 (3rd Cir. 2010) (To be successful, a tribe needs to establish "that that it has preserved its tribal status," 2008 WL 2165191, at *12, from the time at which it signed the treaty. This showing can be complex, requiring the tribe to "trac[e] the modern group's ancestry to the original tribe" and show that it has "maintain[ed] an 'organized tribal structure.'" *Id.* at *13 (quoting *U.S. v. Washington*, 641 F.2d 1368, 1371 (9th Cir. 1981)). Further, a tribe must establish that "some defining characteristic of the original tribe persists in an evolving tribal community," *id.* (quoting *Washington*, 641 F.2d at 1372–73), and that there has been "continuous governmental control over their members' lives." *Id.* at *14).

- *United States v. Candelaria*, 271 U.S. 432 (1926) ("Although sedentary, industrious, and disposed to peace, they are Indians in race, customs, and domestic government, *always* have lived in isolated communities, and are a simple, uniformed people, ill-prepared to cope with the intelligence and greed of other races." 271 U.S. at 441–42 (emphasis added)).

- *United States v. Chavez*, 290 U.S. 357 (1933) (The court held that the Pueblos were Indians under *Montoya* and *Candelaria* and that their lands were Indian country. The court does not engage in much factual analysis, but it does note that the Pueblos held an "ancient" land grant, 290 U.S. at 364, that they "always live[d] in separate communities," and that they were "governed according to crude customs inherited from their ancestors." *Id.* at 361. These factors indicate that the court was looking to a link between pre-contact Pueblos and the Pueblos of 1933).

- *Canadian St. Regis Band of Mohawk Indians v. New York*, 146 F. Supp. 2d 170 (N.D.N.Y. 2001) (The *Canadian St. Regis* court engages in a fairly cursory *Montoya* analysis, but ties its inquiry to the date of the treaty at issue: 1796).

- *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1272-73 (9th Cir. 2004) (The court notes in dicta that the "theory that underpins Indian law is that the Indian tribes possessed certain sovereign rights based on their existence as distinct political entities exercising authority over their members" before incorporation into the United States.).

In addition, federal courts have been clear that there is no basis to rely upon a presumption of tribal existence, such as the Discussion Draft does in section 83.10(g)(3)(i) with

the reliance on a state reservation since 1934 as the assumed basis for a positive expedited final finding. *United States v. Washington*, 641 F.2d at 1374; *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 548 (10th Cir. 2001); *Miami Nation of Indians of Indiana, Inc. v. U.S. Department of the Interior*, 255 F.3d 342, 350 (7th Cir. 2001).

This overwhelming body of case law that continuous existence from historic times to the present as a social community and political entity is necessary for a tribe to exist defeats the proposal in the Discussion Draft to measure tribal existence from only 1934 and to create a presumption based on the mere existence of a state reservation.

In addition to the case law requirements for continuous tribal existence from historic times, the consistent BIA criteria have also adhered to the same principle and, in addition, have expressly rejected the 1934 date.

The BIA definition of a tribe as requiring continuous existence over time emerged during the New Deal era where "Interior Department lawyers stated that tribes had to have an unbroken existence in order to be recognized. . . ." Miller, *Forgotten Tribes: Unrecognized Indians and the Federal Acknowledgment Process*, 29 (2004). Beginning at this time, BIA lawyers determined that "all presently existing tribes had had a continuous existence since time immemorial" and to be recognized "a tribe not only had to exist in the present but also had to have always exited." *Id.*

During this era, the Cohen Criteria emerged as the basis upon which tribal existence would be determined. As set forth in Cohen's 1941 *Handbook of Federal Indian Law*, the considerations to define the existence of a tribe were:

> (1) That the group has had treaty relations with the United States.
>
> (2) That the group has been denominated a tribe by act of Congress or Executive Order.
>
> (3) That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe.
>
> (4) That the group has been treated as a tribe or band by other Indian tribes.
>
> (5) That the group has exercised political authority over its members, through a tribal council or other governmental forms.

Cohen, *Handbook of Federal Indian Law*, 271 (1941).

In addition, the *Handbook* noted that:

> Other factors considered, though not conclusive, are the existence of special appropriation items for the group and the social solidarity of the group.
>
> Ethnological and historical considerations, although not conclusive, are entitled to great weight in determining the question of tribal existence.

Id.

While the Cohen Criteria served as a stop-gap method to define the status of a tribe under federal law, an increasing number of requests for acknowledgment created a clear need for more formal standards. By the mid-1970's, BIA declared a moratorium on any tribal acknowledgment reviews until it could develop formal standards. BIA, *Status Summary of Acknowledgment Cases as of February 15, 2007*, at 1 (2007). At the same time, Congress created the American Indian Policy Review Commission (AIPRC), which conducted an overview of all federal Indian policy. Among its recommendations, the AIPRC called for the establishment of a formal acknowledgment program. AIPRC, *Report on Terminated and Nonfederally Recognized Indians*, 462-67, 476-79 (1977). It did not, however, recommend the criteria that should be used to acknowledge tribes.

In 1978, Senator Abourezk of South Dakota reacted to the AIPRC report and introduced legislation that would have established statutory criteria and procedures for federal tribal recognition. S. 2375, 95th Cong. (1978). His bill would have had only two criteria: 1) group identification as Indians since 1934, and 2) longstanding political influence or authority. The Abourezk proposal, with its lax standards, met with strong opposition from the Department of the Interior, the National Congress of American Indians, and the National Tribal Chairmen's Association. These organizations favored stricter standards, as did BIA. In the face of this opposition, the Abourezk bill, with its 1934 start date, failed to pass. Miller, *Forgotten Tribes, supra*, 40-45.

When BIA published its initial acknowledgment rules in 1978, it set forth rigorous criteria calling for a document-intensive program with the burden of proof placed on petitioners to establish their continuous existence. As stated in the preamble to the 1978 regulations: "Although petitioners must be American Indians, groups of descendants will not be acknowledged on a racial basis. Maintenance of tribal relations - a political relationship - is indispensable." 43 Fed. Reg. 39361, 39362 (Sept. 5, 1978). To meet this test, the petitioner had to prove it satisfied the criteria "dating back to the earliest documented contact between the aboriginal tribe from which the petitioners were descended and citizens or officials of the related states, colonial and or territorial governments, or if relevant, citizens or officials of foreign governments from which the United State acquired territory." *Id.* at 39362.

In 1991, BIA initiated a process to revise the acknowledgment regulations. 59 Fed. Reg. 9280 (Feb. 25, 1994). During this process, some commenters asked for a "start date" of 1934, similar to the Discussion Draft. Once again, BIA *expressly and emphatically* rejected this

approach as being inconsistent with the fundamental principle of federal tribal acknowledgment – the continuous existence of a functioning tribal entity from the point of first sustained contact:

> The purpose of the acknowledgment process is to acknowledge that a government-to-government relationship exists between the United States and tribes which have existed since first contact with non-Indians. Acknowledgment of an historic tribe requires continuous tribal existence. A demonstration of tribal existence only since 1934 would provide no basis to assume continuous existence before that time. Further, the studies of unrecognized groups in the 1930's were often quite limited and inaccurate. Groups known now to exist as tribes then, were portrayed as not maintaining communities or political leadership, or had their Indian ancestry questioned. Thus, as a practical matter, 1934 would not be a useful starting point.

Id. at 9281.

This response indicates that the Department's official position in 1994 was that a starting date of 1934 was not sufficient to demonstrate continuous tribal existence because an assumption could not be made that a tribe existed continuously prior to that date. It also held that the evidence for unrecognized groups in the 1930's was inadequate and that petitioners needed a much longer historical continuum to meet the mandatory criteria.

The Department added language to criterion (b) that made explicit the fact that community must be demonstrated historically as well as currently. In defending this revision it explained that:

> Demonstration of continuity of a historical community is necessary in order to meet the intent of the regulations that continuity of tribal existence is the essential requirement for acknowledgment. In addition, political authority cannot be demonstrated without showing that there is a community within which political influence is exercised.

Id. at 9287.

The Department also confirmed the importance of this continuous tribal existence requirement in testimony to Congress. As testified to the Senate Indian Affairs Committee in 1995 by Michael Anderson, Deputy Assistant Secretary for Indian Affairs:

> Federal courts have upheld the Department's position that the essential requirement for acknowledgment is continuity for tribal existence. The Federal court in *United States v. Washington* rejected the argument that "because their ancestors belonged to treaty Tribes, the appellants benefited

> from a presumption of continuing existence." The court further required that Tribes must have functioned since treaty times as "continuous separate, distinct Indian cultural or political communities" (641 F.2d 1374 (9th Cir. 1981)). A demonstration of Indian ancestry is not sufficient.

S. 479, To Provide for Administrative Procedures to Extend Federal Recognition to Certain Indian Groups: Hearing Before the Senate Indian Affairs Comm., 104th Cong. at 65 (July 13, 1995).

As Deputy Assistant Secretary Anderson further testified:

> The BIA process only recognizes continuously existing tribes. S. 479, like the BIA's current regulation, requires that a recognizable group have existed as a tribe since first sustained contact with Europeans. The continuity of tribal existence is a foundation of tribal sovereignty, well supported in past and recent court decisions.

Id. at 66. In fact, the Department expressly rejected the 1934 start date, stating:

> The Department does not believe that it has the authority to recognize non-historic Tribes. The Secretary's authority rests on the principle underlying every decision -- that we are to acknowledge groups which have continued to exist and to maintain their political authority. We cannot create Tribes. Congress does not have the authority to create non-historic Tribes. If Congress wants the Department to recognize groups which are commonly regarded as nonhistoric Tribes," then it needs to give the Department the authority to do so, and prescribe the definition such groups must meet.
>
> Using 1934 as a starting point to apply acknowledgment criteria for all groups would hurt some petitioners and open the possibility of recognizing some non-Indian groups as Indian tribes.
>
> Testimony prepared on S. 479, and on earlier similar bills, as well as on the 1991proposed revised regulation, has suggested that petitioners should only be required to demonstrate continuity of existence since 1934, the date of the Indian Reorganization Act. We have found several groups, however, that have no Indian ancestry that were claiming it in that period. Also, contrary to the testimony , there was incentive long before 1934 to claim Indian identity. However, identity as Indian is not a demonstration of

> tribal existence as a social and political community, as required to have sovereign powers as a Tribe.
>
> Proposed findings on two unrecognized groups (Mowa, Choctaw and Ramapough Mountain Indians), which have at times been regarded as "non-historic Tribes," demonstrate that these groups may not have any historical connection with Indian Tribes. The proposal to limit a petitioner's history to the period from 1934 to the present might have meant that the true character of these two groups would not have been discovered. They had become, more or less, identified as Indian groups by then, even though we have not found a connection with an Indian Tribe.
>
> BAR's demands for evidence are reasonable and consistent with scholarly standards.

Id. at 67.

As recently as 2007, the Department testified against changing the date for criteria (b) and (c), in this case to 1900:

> It doesn't address the institutional knowledge of the Department of the Interior on these matters, and lowers the bar for acknowledgment by requiring the showing of continued tribal existence only from 1900 to present, rather than from the first sustained contact with Europeans, as is in the current standard.

H.R. 2387, Indian Tribal Federal Recognition Administrative Procedures Act: Hearing Before the H. Comm. on Nat. Resources, 105th Cong. at 23 (2007) (statement of Carl J. Artman, Asst. Sect. for Indian Affairs, Bureau of Indian Affairs, Wash., D.C.).[2]

In 2008, BIA again revised the acknowledgment regulations, this time to change the historical starting date from criteria (b) and (c) from first sustained contact to 1789, the year in which the Constitution was ratified. In doing so, BIA sought to "reduce the evidentiary responsibilities of the petitioner" and did so by requiring proof of "continuous tribal existence only since the formation of the United States, the sovereign with which [the petitioner] wishes to establish a government-to-government relationship." 73 Fed. Reg. 30147 (May 23, 2008). Once again, BIA rejected calls for a later date.

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[2] Between 1995 and 2011, Congressman Faleomavaega introduced eight bills with a start date of 1900 or 1934 and Senator Campbell introduced two bills that proposed a start date of 1900. Specifically, Congressman Faleomavaega introduced the following bills in: 1995 (H.R. 2591), 1997 (H.R. 1154), and 1999 (H.R. 361) that proposed 1934 as the starting date. However, his later bills in 2001 (H.R. 1175), 2005 (H.R. 464), 2007 (H.R. 2837), 2009 (H.R. 3690) and 2011 (H.R. 3103) proposed a start date of 1900. Senator Campbell introduced bills in 2001 (S.504) and 2003 (S.297) that also proposed 1900. The Department consistently opposed this legislation, and is not on the record as supporting the change of the start date as proposed in these bills.

Thus, *only five years ago*, when BIA revised the acknowledgment regulations specifically to change the start date because evidence of tribal existence occurring centuries ago was difficult to document, it adhered to the principle that the petitioner must still prove continuous existence over an extended period of time. Based on the "government-to-government" relationship that results from acknowledgment, BIA concluded that the start date should be when the federal government itself established its ratified governing document, the U.S. Constitution (1789). While a good argument can be made that this new date is too permissive and does not follow the *Montoya* test or the Cohen Criteria, it nonetheless has a logical basis in the need for any tribe that had its origins prior to the creation of a functioning U.S. government to have remained in continued existence exercising tribal relations since that date.

Not only does the 1934 start date conflict with case law and BIA precedent, it has no rational basis and has never been explained or justified by BIA in the Discussion Draft. The IRA of 1934 did not establish any acknowledgment criteria or authority, nor did it make pronouncement of federal status for every tribal group or organization in existence at that time. In fact, the IRA *supports* the argument that an earlier start date is required. For example, the definition of "Indian" in section 19 includes "all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction, and all persons who are descendants of such members, on June 1, 1934, residing within the present boundaries of any reservation, and shall further include all other persons of one-half or more Indian blood." 25 U.S.C. § 479. Thus, the IRA's definition emphasizes the following: descent from an historical tribe; *previous* federal jurisdiction, which necessarily involves a relationship over an historical continuum; organized entities; Indian blood quantum; and residence on a reservation. The only basis upon which to explain the 1934 date is that it would substantially reduce the burden on petitioners to attain acknowledgment. Such a result-oriented justification is arbitrary and capricious and cannot serve as the basis for casting aside longstanding agency and judicial precedent.

Finally, the best evidence of why the pre-1934 start date must be retained is presented by the STN RFD. Throughout the review of the STN petition, BIA repeatedly found that this group could *not* prove that it continued to exist during extended periods of time, including *before 1934*. Proposed Finding, 67 Fed. Reg. 76184, 76185-88 (Dec. 11, 2002); Final Determination, 69 Fed. Reg. 5570, 5572-73 (Feb. 5, 2004). In fact, BIA found that the STN failed to satisfy criteria (b) and (c) for nearly all of the twentieth century. *See* Final Determination, 69 Fed. Reg. at 5571. In addition, BIA determined that the STN as an historical tribe emerged sometime in between 1720 and 1730. Proposed Finding, 67 Fed. Reg. at 76187. Consequently, under every controlling judicial and administrative precedent, the STN had tribal origins before 1789 and the ratification of the U.S. Constitution, but ceased to function as a political and social entity during extended periods of time *before 1934*. Years of BIA review -- of hundreds of thousands of pages of evidence --confirmed that the STN could not prove continuous existence and could not attain acknowledged status. The Discussion Draft would make this critically-important failure on the part of the STN irrelevant. The fact that the STN became defunct as a tribal entity for decades would be excused, and the only period for which the group would need to prove its continued

existence would be from 1934 to the present. While the STN would fail this test too,[3] the key point is that the Discussion Draft would allow petitioners that fail the continuous existence test to achieve federal acknowledgment so long as the post-1934 era could be satisfied. Such a result cannot be squared with the legal and policy underpinnings for the federal acknowledgment program.

External Identification -- As noted above, the courts and BIA have ruled on multiple occasions that a tribe does not exist based solely on its self-identification or internal relationships. The petitioning group must also interact as a tribe with external entities, which must recognize that group as a tribe. This requirement makes good sense; if the acknowledgment of a tribe is to create a government-to-government relationship, a "two-way" street is necessary. It is not enough for the tribe to consider itself as such; other entities must do the same. The importance of maintaining criterion (a) for external identification is underscored by the fact that even the very lenient, and ultimately rejected, Abourezk legislative proposal included this factor as one of its two primary acknowledgment criteria. BIA has already once lessened the burden of proof for criterion (a) by adopting a 1900 start date for this showing, 59 Fed. Reg. 9286, rather than the original test of first sustained contact. There is no justification for eliminating this requirement in its entirety.

Tribal Descent -- The Discussion Draft calls for a change in criterion (e), which currently requires evidence that "the petitioner's membership consists of individuals who descend from a historical tribe." 25 C.F.R. § 83.7(e). This requirement has been interpreted by BIA to require a very high percentage of tribal member descent. For example, in 14 of the acknowledgment determinations between 1982 and 2002, membership descent was at least 96%. In the case of the STN, membership descent was 100%. 67 Fed. Reg. at 76188.

The Discussion Draft, however, calls into question how stringently BIA will apply this test. The proposed revision to criterion (e) would establish only an unspecified percentage. Discussion Draft, § 83.7(e) ("At least XX percent of the petitioner's membership consists of individuals who descend from a historical Indian tribe . . . ."). The clear implication is that the Discussion Draft intends to lower the requisite percentage of members with tribal descent by a significant amount. Like every other proposed change to the key criteria of section 83.7, easing the burden of meeting the tribal descent requirements conflicts with the applicable precedent and undermines the legitimacy of the meaning of a tribe by allowing excess membership from recruited or unrelated families and individuals. The requirements of 25 C.F.R. § 83.7(e) should be left intact.

As this overview demonstrates, BIA and the courts have uniformly and consistently adhered to the longstanding tribal relations test; the need for external identification; and the rejection of the notion that tribal continuity can be presumed, as in the mere existence of state reservations, where sufficient evidence of actual continuous tribal existence is lacking. Instead, these principles have held up, and have been rigorously applied, for every acknowledgment decision dating from at least 1978. It would be arbitrary and capricious in the extreme to

[3] BIA also found that STN failed to prove social community and political authority during the post-1934 era. Proposed Finding, 67 Fed. Reg. at 76185-86, 76188; Final Determination, 69 Fed. Reg. at 5573.

abandon those principles in favor of the 1934 start date, which has no explanation or justification.

Procedural Deficiencies

The Discussion Draft also suffers from numerous procedural deficiencies, as follows:

Reconsidered Denied Petitions -- Section 83.10(p) of the Discussion Draft would allow a previously denied petitioner to re-petition if it can show "by a preponderance of the evidence, that a change from the previous version of the regulations to the current version of the regulations warrants reversal of the final determination." This re-opener clause is directly contrary to the ironclad rule against a "second bite at the apple" that has prevailed under the acknowledgment regulations from the outset. This provision is problematic not only because it reverses longstanding precedent, but also by virtue of the extreme changes that are made to the criteria, virtually guaranteeing a host of renewed petitions, creating controversy and conflict in long-settled matters. This will undoubtedly invite litigation. Moreover, re-opening old petitions would defeat the purported purpose of this proposal to make the acknowledgment process more streamlined and efficient. The Discussion Draft would open the floodgates to revived petitions, overwhelming BIA staff and creating a logjam in petitions that will likely last for many years. For this reason, section 83.10(p) should be removed from the proposal.

Participating Rights of Interested Parties -- As the Kent School's involvement in the STN proceeding confirms, the full participation of interested parties in every aspect of the petition review is essential. Interested parties, as defined in 25 C.F.R. § 83.1, have a clear stake in the outcome of tribal acknowledgment petitions (e.g., land claims, casino development, inconsistent development in federal trust land, loss of state and local environmental, health and safety controls. etc.). In addition, interested parties are a source of critically important evidence and research. Petitioner groups have the goal of acknowledgment, not the development of a complete and objective record. BIA lacks the resources to conduct independent research, and the Office of Federal Acknowledgment ("OFA") has seen its role constrained by agency guidance from engaging in its own comprehensive evidentiary review. See 73 Fed. Reg. 30,146, 30,147 (May 23, 2008) (emphasizing that OFA's "priority remains to process petitions on active consideration"). Thus, interested parties are likely to be the only reliable source of evidence that will ensure a full and complete record, including evidence that shows why the acknowledgment criteria have not been met.

BIA properly summarized the role of interested parties when it revised the acknowledgment rules in 1994:

> In particular, the Department's position is that parties which may have a legal or property interest in a decision, such as recognized tribes or non-Indian governmental units, *must be allowed to participate*. Other parties . . . often are able to contribute valuable information not otherwise available. . . . *Thus, participation of such interested parties is both appropriate and useful.*

59 Fed. Reg. 9283 (emphasis added). There is no reason for BIA to change this position. Although not perfect or fully balanced, Part 83 currently does provide for interested parties to participate in most of the key aspects of the acknowledgment process. The Discussion Draft, however, would drastically reduce that role, as described previously in these comments. The resulting imbalance would not only be unfair to interested parties, it would virtually guarantee that BIA will be presented with incomplete records that are biased in favor of petitioner groups. The Kent School strongly objects to any modifications to Part 83 that would diminish the rights of interested parties.

Burden of Proof -- The Discussion Draft proposes to establish an evidentiary test for petitioners of "the preponderance of the evidence." Discussion Draft at § 83.6(d)(1)(i). This term is not defined, nor is it clear why any change in the burden of proof should be made from the test that has been applied for 35 years. BIA considered whether to adopt the preponderance of the evidence test in 1994. 59 Fed. Reg. 9280-81. BIA properly rejected this test on the grounds "[i]t is not appropriate for the present circumstances where the primary question is usually whether the level of evidence is high enough, even in the absence of negative evidence, to demonstrate meeting a criterion, for example, showing that political authority has been exercised." Under section 83.6, "facts are considered established if the available evidence demonstrates a reasonable likelihood of their validity." This test is far more appropriate than a preponderance test, which "is a legal standard focused on overwhelming evidence for reasons against a position." Id. Under this test, BIA could therefore rule in favor of a petitioner, for example, simply because it offers more evidence on a criterion factor than any other party, even though that evidence would not be enough to establish the likelihood of the fact at issue. Thus, like so many other aspects of the Discussion Draft, the use of the preponderance of the evidence test seems to be designed to put petitioners in a near-automatic position to achieve a positive finding and to abandon well-established and more objective precedent. BIA should delete the preponderance of evidence provision from any proposed rule and leave the current standard in place.

Presumption In Favor of Petitioners -- The current Part 83 regulations properly place all evidence on an equal footing. That evidence is evaluated on the basis of its authenticity and probative value; no preference is assigned to either party and no presumption for or against any party is made. This even-handed treatment of evidence is not only appropriate, it is fundamental to a fair and balanced review of any petition. Kent School objects to the provision of the Discussion Draft that would require BIA to consider evidence in the light most favorable to the petitioner. Discussion Draft at § 83.6(d)(1)(i). Establishing this principle creates a strong pro-petitioner bias and actually favors efforts to withhold evidence because "gaps" would be construed favorably to the groups seeking acknowledgment. Like the current Part 83 procedures, the rule should simply be that the evidence will be treated at face value, with no presumption in favor of any party.

IBIA Appeal -- The administrative appeal provisions of 25 C.F.R. § 83.11 are an essential and integral component of the acknowledgment; they must be retained.

As the STN petition demonstrates, the role played by the IBIA for independent review is integral to fact-finding and achieving an objective and defensible decision. Prior to the IBIA review of the STN petition, BIA's FD relied on the flawed state recognition/reservation theory, which was itself the result of a political decision by former Assistant Secretary Gover to give undue weight to the mere existence of Connecticut reservations. Proposed Finding for Federal Acknowledgment of the Paucatuck Eastern Pequot Indians, 65 Fed. Reg. 17294, 17294-95 (Mar. 31, 2000) (principle first established for Paucatuck Eastern Pequot). It was the IBIA, therefore, that took the steps necessary to ensure a fair and legally-correct decision. There is no denying the importance of this step in the acknowledgment process.

Not only does IBIA review improve the prospects for a legally correct decision, it also makes the acknowledgment process more efficient, not less. IBIA appeal sharpens the issues in dispute and establishes a filter that limits the eventual scope of judicial review and clarifies the record. Most acknowledgment decisions that give rise to an administrative appeal under section 83.11 are likely to end up in litigation. A strong IBIA decision and subsequent RFD reduce the risk of litigation and narrow the basis for judicial review, should a lawsuit result. This level administrative review also improves BIA's prospects for successfully defending the ultimate decision. Moreover, IBIA appeal lessens the potential for politically-motivated FD decisions, because the administrative law judges bring an independent and precedent-based perspective to bear (as shown by the STN decision). Thus, IBIA review under current rules *improves* the efficiency, effectiveness, fairness, and objectivity of the acknowledgment process. It would be a folly of high order to delete the administrative appeal and reconsideration requirements of section 83.11 if the goal of the Discussion Draft is to ensure that the *entire* acknowledgment process, including litigation, is legally sound and efficient for all parties.

Conclusion

The Discussion Draft sets forth numerous proposed revisions to the BIA acknowledgment regulations that depart from decades of case law and administrative precedent. They would result in unfair and incorrect results in Connecticut – and in similarly-situated states – by making possible the acknowledgment of previously denied petitioners and possibly new petitioners who clearly do not qualify as federal tribes. The Discussion Draft would also undermine the procedural rights of interested parties and result in a biased process that favors petitioners. The end result of adopting the Discussion Draft proposal would be to defeat its ostensible purpose of creating a more consistent, efficient, fair, and cost-effective acknowledgment process. Kent School requests that the Discussion Draft be withdrawn until and unless a new proposal can be developed that is in line with current legal authority.